TAN KIM CHUAN & ANOR.

v.

CHANDU NAIR KRISHNA NAIR

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
GUNN CHIT TUAN SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 02-533-1989]
25 JANUARY 1991

DAMAGES: *Loss of earning capacity - Entitlement if not working at time of accident - Civil Law Act 1956, s. 28A(2)(c)(i), (ii).*

STATUTORY INTERPRETATION: *Accident cases - Damages - Whether claimant entitled to loss of earning capacity when not working at time of accident - 1984 amendments - Pre 1984 common law - Clear and precise words of statute - Literal and purposive construction - Civil Law Act 1956, s. 28A(2)(c)(i), (ii).*

The respondent was 12 years old at the time of the accident and was a student who was not earning anything. The High Court had awarded the respondent a sum of RM67,200 as general damages for prospective loss of future earnings. The appellants contended that the learned trial Judge erred in law and in fact in awarding the respondent a sum as general damages for prospective loss of future earnings; further that the trial Judge ought to have held that s. 28A(2)(c)(i) and (ii) of the Civil Law Act 1986 (the Act) precluded the making of an award in general damages for prospective loss of future earnings.

The question for the Court is whether the respondent is eligible, as a pure question of law, for any award for loss of earning capacity in consequence of the accident; this issue rests solely on the interpretation of s. 28A(2) of the Act and whether the 1984 amendment ousts the discretion and past practices of the Court based primarily on common law.

Held:

[1] The Court only needs to interpret the law if the intention of the Legislature is not clear; before the Court, exercises its power to interpret, it must be convinced that the words to be interpreted are loose or inexact.

[2] The Courts have always been inclined to follow purposive and literal constructions where that meaning is in accordance with the legislative purpose.

[3] An Act will be followed where that meaning is in accordance with the legislative purpose.

[4] (a) The word "shall not be awarded" in s. 28A(2)(c)(i) and "shall not take into account" in s. 28A(2)(c)(ii) clearly indicate that it is an essential prerequisite that in awarding damages for loss of future earnings or loss of earning capacity, there must be proof that the claimant was receiving earnings by his own labour or other gainful activity before he was injured;

(b) even in cases where the plaintiff was receiving earning before he was injured, the provisions make it clear that a Court shall not take into account any prospect of such earnings being increased at some time in the future.

[5] The words in s. 28A(2)(i)(ii) "only the amount relating to his earning aforesaid at the time when he was injured and the Court shall not take into account any prospect of earnings aforesaid being increased at some time in the future" makes the intention of the Legislature abundantly clear and the Legislature had the prospect of future earnings in mind when the law was enacted.

[6] (a) The continued validity of common law concept governing the future earnings of injured people in contrast to amended provisions in accident cases such as the present are inconsistent with each other and cannot co-exist.

(b) Common law notions and legislative amendments regarding future earnings are so repugnant to each other that a repeal of common law is implied.

[Appeal allowed.]

Cases referred to:
Dirkje Peiternella Halma v. Mohd. Noor bin Baharom & Ors. [1990] 1 CLJ (Rep) 99
Fairley v. John Thompson Ltd. [1973] 2 Lloyd's LR 40
Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors. [1985] CLJ (Rep) 473
Jamil bin Harun v. Yang Kamsiah & Anor. [1984] 1 MLJ 217
Magor & St. Mellons RDC v. Newport Corporation [1952] AC 189
Mohamed Syedol Ariffin v. Yeoh Ooi Gark [1916] 2 AC 575
Ngooi Ku Siong v. Aidi Abdullah [1984] 1 CLJ (Rep) 294
Seaford Court Estates Ltd. v. Asher [1949] 2 KB 48
Spillers Ltd. v. Cardiff Assessment Committee [1931] 2 KB 21
Tay Tong Chew & Anor. v. Abdul Rahman bin Haji Ahmad [1984] 1 CLJ (Rep) 389
Ti Huck & Anor. v. Mohamed Yusof [1973] 2 MLJ 62
United Hokkien Cemeteries Penang v. Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121
Vengadasalam v. Khor Soon Weng & Ors. [1985] 2 MLJ 450
Yang Yap Fong & Anor. v. Leong Pek Hoon & Anor. [1987] CLJ (Rep) 419

Legislation referred to:
Civil Law Act 1956, ss. 3, 5, 28A(2)(c)(i), (ii)

For the appellants - G. Sri Ram (C.S. Kumar with him); M/s. Tung & Kumar
For the respondent - Manjeet Singh Dhillon; M/s. Manjeet Singh Dhillon

JUDGMENT

Abdul Hamid Omar LP:

This is an appeal against the decision of the High Court Temerloh relating to a claim arising from an accident on 13 May 1985 causing injuries and damages to the plaintiff/respondent. This appeal is against the quantum of damages as the original appeal against the apportionment of liability was abandoned at the outset of the hearing. The facts are not in dispute. The plaintiff was 12 years old at the material time of the accident and was a student not earning anything. The grounds of appeal as contained in the memorandum are reproduced below:

> (4) The learned trial Judge erred in law and in fact in awarding the respondent a sum of RM67,200 as general damages for prospective loss of future earnings.
>
> (5) The learned trial Judge ought to have held that s. 28A(2)(c)(i) and (ii) of the Civil Law Act 1956 (the Act) precluded and/or barred the making of an award in general damages for prospective loss of future earnings and/or reduced earning capacity and/or loss of earning capacity on the grounds that

(a) the respondent was not receiving earnings by his own labour;

(b) neither was he engaged in gainful activity;

(c) the respondent was at the time of injury an unemployed school going infant; and

(d) the legislative intent and purpose of the amendments to the Act was to bar speculative and large awards in situations involving unemployed individuals and/or infants.

The crucial question raised before us is whether the plaintiff is eligible, as a pure question of law, for any award for loss of his earning capacity in consequence of the accident. Coming straight to a consideration of this basic issue, we feel that the answer to this question mainly depends on the interpretation of the Civil Law Act 1956 (Act 67) as amended in 1984.

At the outset we bear in mind when the matter of statutory interpretation is involved what Lord Hewart CJ said in *Spillers Ltd. v. Cardiff Assessment Committee* [1931] 2 KB 21, 43:

> It ought to be the rule and we are glad to think it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing something in the context which goes to show that the loose and inexact meaning is to be preferred.

To the above we wish to add that for the words "in a statute" to be construed effectively reference must be made to their context.

The amended s. 28A(2) states that:

(c) in awarding damages for loss of future earnings the Court shall take into account:

(i) and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured.

The question that emerges is whether this amendment forbids award for loss of earning capacity in this case.

Under the common law and pre-84 statutory law, there was a difference in law between the loss of earnings and loss of earning capacity. This is explained by Lord Denning in *Fairley v. John Thompson Ltd.* [1973] 2 Lloyd's LR 40 at p. 42:

> It is important to realise that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.

To illustrate Lord Denning said:

> a manual worker may be incapacitated for manual work, but after the accident he may learn a clerical trade. At his new trade he may actually earn more than he would have done before. (See Federal Court decision in *Tay Tong Chew & Anor. v. Abdul Rahman bin Haji Ahmad* [1984] 1 CLJ (Rep) 389; *Ti Huck & Anor. v. Mohamed Yusof* [1973] 2 MLJ 62; *Ngooi Ku Siong v. Aidi Abdullah* [1984] 1 CLJ (Rep) 294; all these cases are pre-amendment cases).

It may be argued that such distinction is subtle and is only applicable for legal purposes of assessing an award for damages. However, where the award itself is unauthorised by statutory law, its distinction is of no consequence. For practical purposes, it is immaterial whether damages is termed as "loss of earnings" or "loss of earning capacity". Be that as it may, for the purpose of the decision in this case, we do not wish to dwell more on the traditional heads of damages loss of earnings and loss of earning capacity.

The cardinal issue for us to decide is did the 1984 amendments oust the discretion and powers and past practices of the Court based primarily on common law? If we hold that the amendments clearly superceded the common law and previous statutory law, then the plaintiff is not entitled to any compensation either for loss of earnings or earning capacity as he was not earning anything at the material time of the accident.

It would be the function of this Court to interpret the statutes where there is a lacuna or an area of ambiguity. We need only interpret the law if the intention of the Legislature is not clear. This time honoured judicial trend has never been questioned by any authority and therefore before we exercise our power to interpret we must be convinced that the words to be interpreted are loose or inexact. As the point raised is of vital importance in future cases, we have given considerable attention to this point to do justice to the parties.

In the process of inquiry we came across some decisions touching on the reception of English law locally. In a Privy Council decision in the case of *Mohamed Syedol Ariffin v. Yeoh Ooi Gark* [1916] 2 AC 575, Lord Shaw stated:

> that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction is varied or denied effect.

If such was the attitude then, the same principles should be more rigidly applicable now in view of the sovereignty and the abolition of appeals to the Privy Council. In another Privy Council case *Jamil bin Harun v. Yang Kamsiah & Anor.* [1984] 1 MLJ 217, it was held:

> (1) it is for the Courts in Malaysia to decide, subject always to the statute law of the Federation, whether to follow English law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the Courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

We hasten to add that we are conscious that there are two schools of thought relating to statutory interpretation. Lord Denning favoured a creative role for Judges, taking on themselves the task of ascertaining the purpose of an act and the ironing out creases which may appear. Lord Denning has observed that:

> it would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which give rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give 'force and life' to the intention of the Legislature. (*Seaford Court Estates Ltd. v. Asher* [1949] 2 KB 481, 499.)

The other school, notably Lord Simonds, did not share Lord Denning's approach and argued against such a creative role preferring to leave all aspects of the legislative function to Parliament, "if a gap is disclosed, the remedy lies in an amending Act.'' (*Magor & St. Mellons RDC v. Newport Corporation* [1952] AC 189).

In the same case Lord Morton of Henryton remarked that:

> In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or orders, either by the language used or by necessary implication, the Courts should, of course,

> carry these intentions out; but it is not the function of any Judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the Legislature.

While we respect both schools, we do not really have to prefer any of these opinions. We also need not dwell much on various rules and aids to construction of statutes except to say, in general, that we have always been inclined to follow purposive and literal constructions which means that the literal meaning of an Act will be followed where that meaning is in accordance with the legislative purpose. (See the decision in *United Hokkien Cemeteries Penang v. Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121; *Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors.* [1985] CLJ (Rep) 473; *Vengadasalam v. Khor Soon Weng & Ors.* [1985] 2 MLJ 450.

For the purpose of the present case, let us examine whether the meaning of the words in the relevant amended Act is very clear whatever canons of construction we apply.

The marginal note to s. 28A which reads "Damages in respect of personal injuries" suggests that the provisions are exhaustive and mandatory. The word "shall" in the opening sentence in para. (c) and the words "shall not be awarded" in sub-para. (i) of para. (c) and the words "shall not take into account" in sub-para (ii) of para. (c) in subsection (2) of s. 28A clearly indicate that it is an essential prerequisite that in awarding damages for loss of future earnings or loss of earning capacity there must be proof that the claimant was receiving earnings by his own labour or other gainful activity before he was injured. Even in cases where the plaintiff was receiving earnings before he was injured, the provisions make it clear that a Court shall not take into account any prospect of such earnings being increased at some time in the future.

The other argument presented before us for the respondent in this appeal is that the Act did not intend to deprive the claimant of the loss of earning capacity. We feel that such interpretation is not supported at all by the language of s. 28A itself. We reiterate that s. 28A(2)(c)(ii) which states that

> only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of earnings aforesaid being increased at sometime in the future.

makes the intention of the Legislature abundantly clear and indeed the Legislature had the prospect of future earnings (whatever be the label attached to it) in mind when the law was enacted.

We need not rely on English authorities to decide this case. In our view much significance must be attached to the fact that our amending Act is not at *pari materia* with English legislation. More importantly our Legislature has clearly exercised its own sovereign and independent mind in effecting the amendments to suit the economy and special conditions unique to us.

It is abundantly clear that the Legislature, in its own wisdom, decided that an injured person ought not to get any damages in a claim either for loss of future earnings or loss of earning capacity unless before the accident (at the date of accident) he was in fact receiving earnings. To hold otherwise we mean that the Court is creating law to provide for something clearly the Legislature has no intention to do. We feel that our Legislature has enacted exhaustively and exclusively. The continued validity of common law concept governing the future earnings of injured people in contrast to amended provisions in accident cases such as the present are inconsistent with each other and cannot co-exist.

The common law notions and our legislative amendments regarding future earnings are so repugnant to each other that a repeal of common law is implied. Sections 3 and 5 of the Civil Law Act 1956 states, among other things, that in West Malaysia common law as administered in England as on 7 April 1956, is only applicable to any other written law, in which category the 84 amendment falls.

It is to be observed that in the case of *Yang Yap Fong & Anor. v. Leong Pek Hoon & Anor.* [1987] CLJ (Rep) 419, the Supreme Court in 1987 had granted compensation for loss of earning capacity of a 13-year old plaintiff. We feel that the earlier tribunal did not have the opportunity to be addressed on the full effect of legislation overlapping existing law. The recent case of *Dirkje Peiternella Halma v. Mohd. Noor bin Baharom & Ors.* [1990] 1 CLJ (Rep) 99, which was heard by another panel of this Court and awarded the plaintiff a sum of RM200,000 for loss of earning capacity, can be distinguished from the present case because in that case there was evidence that the plaintiff was earning RM1,270 per month before she came to this country for a holiday and was knocked down by a bus. In that case, there was evidence to show that she had suffered a loss of earning capacity.

In the light of all the above circumstances, we are unable to agree with the decision of the learned Judge. We accordingly allow the appeal and vary the judgment, quashing the award for loss of earning capacity for RM67,200 in this case with interest.

We also award half costs of this appeal to the appellants. Deposit is refunded.

Also found at [1991] 1 CLJ 682